No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF.

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which is wholly consistent with innocence and does not even raise a suspicion of guilt. Out of these insignificant happenings between appellant Williams and defendant Smith, the Government attempts to build up a case on Count Eight, the conspiracy count. However, the build-up fell with Juanita Smith's acquittal on the conspiracy count and the other two counts in the indictment in which Juanita Smith was charged with substantive offenses alleged as overt acts of the conspiracy.

Appellee does not contend that Ruth Williams ever saw or knew or had any connection, directly or indirectly, with defendant Bryant. The slight connection between Juanita Smith, arising out of the visit by Ruth Williams to Juanita Smith's home, is not indicative of a criminal purpose of any sort. As said before, the relevancy of the visit of Ruth Williams to Juanita Smith's home vanishes with the acquittal of Juanita Smith on Count Eight, the conspiracy count, and the two substantive counts, Counts Two and Three, under which Juanita Smith was indicted.

It is related in appellee's STATEMENT OF FACTS (Appellee's Br. pp. 15-16) that the officers saw defendant Bryant, February 21, 1958, enter the gate through the brick wall at 5417½ South Wilton Place, Los Angeles, which is the entrance to Ruth Williams' home off the alley connecting Cimarron Street and South Wilton Place; and that shortly thereafter the officers saw defendant Bryant leave the alley alongside 5417½ South Wilton Place. That is the sole evidence of the Government to connect appellant Ruth Williams with defendant Bryant.

There is complete agreement between the witnesses for the Government and those of appellants that the gate

which the officers saw Bryant enter was the entrance to a small yard from which one entering the gate could go up the steps on the side wall of the old garage to Ruth Williams' upstairs living quarters. It is not claimed that Bryant went up those steps. Unless Bryant had gone up the steps she could not have been seen by the officers as the gate is a solid one and it closes an opening through a five to six foot brick wall which would obscure her from view unless she did take to the steps. From the small yard there are entrances to four other apartments which constitute a flat building owned by Ruth Williams. There is also egress from this yard around a sharp corner of the garage to another small yard on the south side of the building which is Ruth Williams flower garden. Adjacent to the second yard is a walkway running all along the south side of the flat building and joining on to Wilton Place on the east and a long alley on the west. At the west end of this walkway are the 8 or 10 trash cans which were used by Ruth Williams and the other four tenants in her flat building. It was in one of these trash cans that the alleged narcotic was found upon the search, February 24, 1958, conducted by federal narcotics officers Malcolm Richards and William C. Gilkey pursuant to the search warrant issued earlier that day by Commissioner Hocke. (Appellants' Br. Appx. 1-5.) All of those things occurred prior to February 24, 1958, when the search, seizure and arrest of appellants were said by the officers to have been made.

Nothing appears in appellee's STATEMENT OF FACTS relating to appellants Ruth Williams or Fred Cook (Appellee's Br. p. 18) until Ruth Williams was seen to walk down the steps on the side wall of the garage apartment around 1:00 in the afternoon of February 24. She went

into the small yard between her living quarters and the other flats and disappeared from view for a short time from the view of the watching officers in the area of the other yard, which was not visible from where the officers said they were staked out. She returned a short time later to her apartment. It is entirely consistent with innocence that Ruth Williams, a home and flat owner at the address mentioned, should walk around her own premises without incurring suspicion.

It was conceded by the Government witnesses that *Jesse Thomas,* the phantom informer, disappeared after he set up the deliveries of heroin from defendant Bryant to Deputy Sheriff Burley, and after he had informed the police, so they said, that Ruth Williams was selling narcotics from her home at 5417½ South Wilton Place, Los Angeles, and that she was a source of heroin for defendant Bryant. The phantom informer has not been heard from since. The officers stoutly denied that they knew where he was at the time of the trial, or where he had lived before the trial. There is nothing in the record except this unsatisfactory testimony of the officers to show that there was any such person as *Jesse Thomas. Jesse Thomas* apparently was a fictitious name in the same category as John Doe was in *Roviaro v. United States,* 353 U. S. 53, 77 S. Ct. 623. The phantom informer is *conceded by the Government to have been a participant in the offenses charged in the indictment.* (Appellee's Br. pp. 9-11.) In these circumstances, *Jesse Thomas'* real identity had to be revealed, as he was a material witness for the defense, or the indictment dismissed.

Roviaro v. United States, supra;
People v. Williams, 51 Cal. 2d 355;
People v. Durazo, 52 A. C. 367.

It is said in appellee's STATEMENT OF FACTS that the officers saw appellant Cook (Appellee's Br. pp. 18-19) make two trips between appellant Williams' home and defendant Bryant's home, February 24, carrying the same clothing on both trips. Cook is a nephew of Mrs. Williams. Cook worked at the Wadsworth General Hospital five days a week. Cook was employed by his aunt, Mrs. Williams, on his day off from the hospital as a helper around the flat. The outstanding fact here is that there is not a word of direct testimony in the record that either Ruth Williams or Fred Cook ever at any of the times laid in the indictment against them had in their possession or the possession of either of them any narcotic or that they or either of them ever transported any heroin or ever sold any heroin. The testimony of the officers that defendant Bryant was seen to go in the gateway to Ruth Williams' combination home and flat building, that Ruth Williams was seen walking down the steps from her apartment and moving around the yard of her home and that Fred Cook who was employed by her went from her house to the house of defendant Bryant raises nothing more than a suspicion of guilt even though appellant Williams had a prior narcotics conviction. Outside of the heroin seized from the trash cans in the back of the flat building owned by Ruth Williams and the $15 in marked currency seized from the purse of Ruth Williams and the confession of Fred Cook, the foregoing constitutes all of the evidence tending to connect appellants Williams and Cook with the offenses charged against them in the indictment. The evidence is clearly insufficient to sustain the verdicts against appellants as the evidence does nothing more than predicate guilt upon mere nebulous association which gave rise to a suspicion in the minds

of the jury that appellants were guilty of the charges made against each of them in the indictment. (Appellants' Br. Point V, pp. 57-61.) This case is brought squarely within three recent cases from this Court cited to this point on page 59 of appellants' brief.

Ong Way Jong v. United States, 245 F. 2d 392;
Evans v. United States, 257 F. 2d 121;
Robinson v. United States, 262 F. 2d 645.

This Court said at page 126 of the *Evans* case that:

"There is, of course, evidence of an intimate personal relationship between William and Josephine, who handled the heroin in question. *But guilt may not be inferred from mere association.* Ong Way Jong v. United States, 9 Cir., 245 F. 2d 392, 394.

* * *

"It is no doubt true that the evidence as to William's association with Josephine, and as to his own past record of convictions, *gives rise to a suspicion that he conspired with Josephine regarding the transaction of March 4, 1957. But a suspicion, however strong, is not proof, and will not serve in lieu of proof.* Ong Way Jong v. United States, supra, 245 F. 2d 394."

Appellee states in its brief, page 19, that after the occurrences here outlined it was about 3:00 P.M. on February 24, and that *"the agents were ready for the final scene."* (Appellee's Br. pp. 19-21.) At 3:00 P.M. on the afternoon of February 24 federal narcotic agent Malcolm Richards accompanied by Deputy Sheriffs Landry, Farrington and Gillette, went up the steps on the side wall of Ruth Williams' garage apartment, opened the

door, and entered her apartment without saying a word. Federal Agent Richards was armed with a search warrant and, in spite of what the officers say, the record is clear that Ruth Williams' living quarters were entered under the authority of the search warrant which was held by Judge Mathes to be void. What occurred at 3:00 P.M. is fully set forth under III, STATEMENT OF THE CASE, pages 8 to 22 of appellants' brief. The subject is fully argued under POINT I of appellants' brief, pages 35 to 50, to which reference is here made in order to avoid repetition. While it was conceded by the officers that the quarters of Ruth Williams were searched pursuant to the void search warrant (Appellants' Br. Appx. pp. 1-5) and the evidence seized, upon which the conviction of both appellants rests, the Government, when it was caught in such an invidious position with the void search warrant on its hands, shifted its position to the claim that the search and seizure was incident to a valid arrest. The claim is entirely without foundation and apparently was not made in good faith by the federal narcotics officers at the time of the trial. (Appellants' Br. Appx. pp. 1-5.) Much force is lent to the contention of appellants, that the claim of the narcotics officers that the search and seizure was made pursuant to the alleged arrest, is baseless from the STATEMENT OF FACTS in appellants' brief which fails to contravert a single fact related by appellants in their STATEMENT OF THE CASE, pages 8-22 of appellants' brief. (Subdiv. 3, Rule 18 of the 9th Cit.)

II.

The Claim of the Federal and State Narcotics Officers That They Entered Ruth Williams' Home for the Purpose of Arresting Her Is Not Made in Good Faith as the Record Contradicts the Claim and Shows Without Conflict That Federal Narcotics Officer Malcolm Richards, Who Was in Command of the Expedition, Was Armed With a Search Warrant Which He Had Procured in the Morning of February 24 and That the Premises Were Entered and Searched Pursuant to the Search Warrant Which Was Later Held by Judge Mathes to Be Void.

The circumstances under which the arrest of both appellants Williams and Cook was made are fully covered under appellants' STATEMENT OF THE CASE in their brief, pages 8 to 22. We again refer to the failure of appellee to controvert any of the facts detailed in appellants' STATEMENT OF THE CASE.

The law upon which appellants rely to sustain their contention that the search was made under the void search warrant, and not as the appellee contends pursuant to the alleged arrest, is shown under POINT I OF ARGUMENT in appellants' brief, pages 35 to 50. It is apparent that the record digested under POINT III[3] of appellants' brief, pages 52 to 57, so hurt and weakened the Government's case and frustrated Counsel for the Government that they resorted to an exhibition of anger

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[3]"The United States Commissioner's File Demonstrates That the Testimony of the Officers, Relating the Circumstances of the Alleged Arrest of Appellant Williams and the Search of Her Home as an Incident to That Arrest, Is Untrue."

and unwarranted attack upon the good faith of appellants' Counsel. It is stated in appellee's brief at page 57:

> *"It is obvious that appellants have no compunctions about calling anyone a liar if it suits their convenience and that they are dedicated to the slogan, 'Win at all costs.'"*

The above quotation is taken from POINT Two under ARGUMENT in appellee's brief. (Appellee's Br. p. 57.) Appellee, when presenting its grouping of the contentions made in appellants' brief, says at page 9 of appellee's brief that:

> "3. The government witnesses *lied* regarding the arrest of appellant Williams as proved by the United States Commissioner's file."

Appellee, when making its regrouping of appellants' contentions under ARGUMENT, page 22 of appellee's brief, includes in its regrouping the following:

> "5. The *lies* of the Government's witnesses."

The word, "lie," or "lied," is not used in appellants' brief and we challenge Counsel for the Government to produce a single statement in appellants' brief from which an inference may be drawn to support appellee's claim that the appellants contended in their brief that the Government's witnesses lied. However, we do not desire to take the sort of exception to the untruthful assertions by Government's Counsel, which we are probably privileged to take, by moving to strike the objectionable matter. We are content to have the Government use the term, "lied," as applicable to its own witnesses, as upon due reflection we feel that the term is more descriptive of the testimony of the Government's witnesses than the

mild charge in appellants' brief that the Commissioner's file (Appellants' Op. Br. Appx. pp. 1-5) proves that the Government's witnesses' testimony could not be true. We feel that by giving the intemperate remarks of counsel this sort of treatment we are but aligning ourselves with the holding of the Supreme Court in *McDonald v. United States,* 335 U. S. 451, 456, 69 S. Ct. 191, 193, where that Court said:

> *"History shows that the police, acting on their own, cannot be trusted."*

We perceive no answer in appellee's brief to our POINTS I and III under ARGUMENT in appellants' brief, beginning at page 35 and ending at page 52, that the search and siezure were made *solely on the void search warrant* and that actually *there was no arrest at all of either of the appellants until the following morning, February 25, after the defendants had been booked the night before.* Warrants were then issued and the appellants were arrested. (Appellee's Br. p. 21.)

Appellee tries to avoid the effect of the uncontestable written evidence that Ruth Williams' home was searched pursuant to the search warrant and the articles seized under that search warrant and return made thereon, by saying that appellants do not attack the affidavits attached to the search warrant. The search warrant was held void in a formal written order entered by Judge Mathes. The affidavits were an integral part of the order. [Clk. Tr. pp. 35-37.] Paragraph 3 of Judge Mathes' order reads:

> "That the 'search warrant' obtained on February 24, 1958, by certain law enforcement officers to search 5417½ South Wilton was *wholly inadequate*

and insufficient on its face and such a warrant standing alone could not justify the search of defendant Ruth Johnson Williams' residence, made on February 24, 1958."

It appears from Judge Mathes' order that the Government's claim, that appellants did not attack the affidavits to support the search warrant, is ill-founded. The search warrant being void on its face, as Judge Mathes held, all of it, including the affidavits, was void.

Giordenello v. United States, 357 U. S. 480, 78 S. Ct. 1245.

One other point raised in appellee's brief requires mention. At pages 35, *et seq.,* of its brief appellee seems to contend that the legality of the arrest depends upon the law of California, as the arrest was made in that state. Appellee's point has no merit. California has adopted the exclusionary rule. (See p. 33 of Appellants' Op. Br.) All of this contention of appellee is beside the point. Federal narcotics officers Richards and Gilkey actively participated in the arrest; in fact, the group of officers was under the command of Federal Agent Richards. Participation by a federal officer, however slight, in an arrest, makes the operation a federal one, controlled solely by the Federal Rules of Criminal Procedure and federal statutes on the subject. (See Appellant's Op. Br. pp. 48-50.)

Appellee seems to have missed the point entirely, namely, that the home of Ruth Williams was entered by the officers without stating their purpose or authority, as required by 18 U. S. C. A., Section 3109. It was held in *Miller v. United States,* 357 U. S. 301, 78 S. Ct. 357, that a peace officer, whether he arrests by virtue of a

warrant or by virtue of his authority to arrest without a warrant on probable cause, can enter a home to make an arrest only after first stating his authority and purpose for demanding admission. The stealthy entrance of the federal and state officers here violated the rule of the *Miller* case and Section 3109, U. S. C.

It was held in *Jones v. United States,* 357 U. S. 493, 78 S. Ct. 1253, that probable cause for belief that certain articles, subject to seizure, are in a dwelling is not sufficient to justify a search of the dwelling without a warrant. The law, with respect to entering a home to make an arrest without a warrant of arrest and entering it to make a search without a search warrant is the same in both cases.

The error in admitting the confession of appellant Cook is fully covered at pages 60-61 of Appellant's Opening Brief. However, it might be well to mention that since the illegally seized heroin was admitted into evidence against Cook, his conviction should be reversed on that ground alone.

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191.

Then, too, the recent case of *Giordenello v. United States, supra,* holds that where evidence illegally seized has been introduced against a defendant, his admission of the crime will not save his conviction from a reversal.

Appellee claims that the federal and state officers entered Ruth Williams' home for the purpose of arresting her. (Appellee's Br. pp. 19-21.) The claim establishes the invalidity of the arrest under California law.

People v. Cahan, 44 Cal. 2d 434;

Badillo v. Superior Court, 46 Cal. 2d 269;

Gascon v. Superior Court, 169 A. C. A. 367 (hear. den. by S. Ct.);

People v. Harvey, 142 Cal. App. 2d 728 (hear. den. by S. Ct.);

People v. Harris, 146 Cal. App. 2d 142 (hear. den. by S. Ct.);

People v. Lawrence, 149 Cal. App. 2d 435 (hear. den. by S. Ct.).

Appellants respectfully contend that the judgment of conviction of each of them should be reversed.

Respectfully submitted,

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